

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 11, 2001 Session

**THE UNIVERSITY OF TENNESSEE OF CHATTANOOGA v. KAREN
FARROW and HARRIET WHITE, CONSOLIDATED WITH SARAH
SHARP v. THE UNIVERSITY OF TENNESSEE and JOYCE MERRYMAN
v. THE UNIVERSITY OF TENNESSEE**

**Direct Appeal from the Chancery Court for Knox County
Nos. 146101-3 and 144421-3 Hon. Sharon Bell, Chancellor
Appeal from the Chancery Court for Hamilton County
No. 98-0619 Hon. W. Frank Brown, Chancellor
FILED AUGUST 16, 2001**

No. E2000-02386-COA-R9-CV

Rule 9, T.R.A.P. Appeals granted on the issue of whether the parties are entitled to a jury in claims brought under the Tennessee Human Rights Act, Tennessee Code Annotated §4-21-101 *et seq.* We hold the parties have the right to a jury trial.

Tenn. R. App. R.9 Appeals; Judgments of the Chancery Court of Knox County are reversed, and the Judgment of the Chancery Court of Hamilton County is affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

Samuel W. Brown and Arthur F. Knight, III, Knoxville, Tennessee, for Appellants, Sarah Sharp and Joyce Merryman.

Pamela R. O'Dwyer and Randall D. Larramore, Chattanooga, Tennessee, for Appellees, Karen Farrow and Harriet White.

Alan M. Parker, Deputy General Counsel, The University of Tennessee, Knoxville, Tennessee, for Appellee The University of Tennessee.

OPINION

In each of these actions, the plaintiff alleged discrimination under the Tennessee Human Rights Act (THRA), Tenn. Code Ann. § 4-21-101, *et. seq.*, and demanded a jury trial. In the cases of Sharp and Merryman, the Chancellor at the instance of the University, struck the demands for a jury. But in the case of Farrow and White against the University of Tennessee at Chattanooga, the Chancellor denied the University's Motion to Strike the jury demand. Interlocutory appeals were granted in each case, and the cases were combined on appeal.

The sole issue on appeal is whether the plaintiffs are entitled to a trial by jury on employment discrimination claims under the Tennessee Human Rights Act, Tenn. Code Ann. §4-21-101, *et seq*? Utilizing the Supreme Court's analysis in *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984), we hold that there is a right to a jury trial under the THRA, because the Act does not expressly exempt that right when creating a civil cause of action for aggrieved persons.

The THRA provides two distinct avenues of redress in discrimination cases.

First, under T.C.A. § 4-21-302, an individual claiming to be aggrieved by a discriminatory practice may file an administrative complaint with the Tennessee Human Rights Commission within 180 days after the commission of an alleged discriminatory practice. The Commission is authorized to "take such affirmative action as in the judgment of the commission will carry out the purpose of this Act." T.C.A. § 4-21-305(b). Affirmative action may include an award of "damages for injury, including humiliation and embarrassment," together with attorney's fees.

Any action taken by the Commission is subject to a limited judicial review. If a complainant, respondent or intervenor is aggrieved by an order of the Commission, including an order dismissing a complaint or stating the terms of a conciliation agreement, he or she may obtain judicial review in chancery or circuit court pursuant to T.C.A. § 4-21-207 of the THRA. The Uniform Administrative Procedures Act, codified at T.C.A. § 4-5-101, *et. seq.*, provides that judicial review of a contested case determination by an agency or commission, shall be without a jury and shall be confined to the record. T.C.A. § 4-5-322.

Administrative relief is not exclusive. The aggrieved individual, without exhausting administrative remedies, may file a direct action in chancery or circuit court pursuant to T.C.A. § 4-21-311, which provides in full:

Additional remedies preserved. -- (a) Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in chancery court or circuit court.

(b) In such an action, the court may issue any permanent or temporary

injunction, temporary restraining order, or any other order and may award to the plaintiff actual damages sustained by such plaintiff, together with the costs of the lawsuit, including a reasonable fee for the plaintiff's attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

(c) In cases involving discriminatory housing practices, the court may award punitive damages to the plaintiff, in addition to the other relief specified in this section and this chapter. In addition to the remedies set forth in this section, all remedies described in § 4-21-306, except the civil penalty described in § 4-21-306(a)(9), shall be available in any lawsuit filed pursuant to this section.

(d) A civil cause of action under this section shall be filed in chancery court or circuit court within one (1) year after the alleged discriminatory practice ceases, and any such action shall supersede any complaint or hearing before the commission concerning the same alleged violations, and any such administrative action shall be closed upon such filing.

Tenn. Code Ann. § 4-21-311.

The plaintiffs in the consolidated cases all took the latter route, filing their claims directly in Chancery Court. Relying upon Tenn. Code Ann. § 21-1-103's grant of the right to a jury trial in chancery court, the plaintiffs each included in their complaints a demand for a jury to decide the factual issues in their cases.

Article I, Section 6 of the Tennessee Constitution guarantees the right to a jury trial as it existed at common law when our Constitution was adopted in 1796, but does not guarantee a jury trial in every case. In our common law system of courts, matters inherently legal in nature were tried in the law courts by a jury while matters inherently equitable were tried by the Chancellor without a jury. Accordingly, there is no constitutional right to a trial by jury in a matter inherently equitable. The common law also did not require a trial by jury in summary proceedings, proceedings for the punishment of small offenses, or for paternity proceedings. See *Clark v. Crow*, 37 S.W.3d 919, 921-922 (Tenn. Ct. App. 2000) (citing *Jones v. Greene*, 946 S.W.2d 817 (Tenn. Ct. App. 1996)).

In addition to the proceedings that did not permit a trial by jury prior to 1796, Tenn. Const. Art I, § 6 does not apply to claims or proceedings established after the adoption of the Tennessee Constitution, and the General Assembly is free to fashion new claims and remedies that do not include the right to a jury. See *Clark* at 922.

The legislature may choose to specifically include the right to a jury trial in enacting new laws, as it did in the divorce laws. Tenn. Code Ann. § 36-4-113 (1996). Additionally, the

General Assembly created a statutory right to a jury trial in equitable matters by enacting Tenn. Code Ann. § 21-1-103, which reads:

21-1-103. Right to trial by jury. -- Either party to a suit in chancery¹ is entitled, upon application, to a jury to try and determine any material fact in dispute, save in cases involving complicated accounting, as to such accounting, and those elsewhere excepted by law or by provisions of this Code, and all the issue of fact in any proper case shall be submitted to one (1) jury.

When the legislature enacted this section, it intended to give a “broad right to trial by jury.” *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 337 (Tenn. 1984). The scope of the right provided in this section, was construed by the Supreme Court in *Smith*, where the Court interpreted the section to find a right to a jury trial under the Open Meetings Act, T.C.A. § 8-44-101 *et seq.*, and the Education Professional Negotiations Act, T.C.A. § 49-5-601 *et seq.* Both of these Acts created causes of action that are purely equitable in nature, and both speak in terms of what the “court” shall have the power to do. Moreover, these were not causes of action that existed at the time our Constitution was adopted. Therefore, at common law, there would have been no right to a jury trial in these cases, and the Supreme Court, in considering the applicability of T.C.A. § 21-1-103 to these causes of action, said:

It is our conclusion, therefore, ... that only those cases are excepted from the above quoted Code sections which are expressly excepted by the provisions of the Code, and those statutory exceptions not found in the Code; and such as by their very nature must necessarily be deemed inappropriate and not a proper case to be submitted to a jury such as *Pass v. State*, 181 Tenn. 613, 184 S.W.2d 1 [1944] (a contempt proceeding for violation of an injunction), unless in such case express provision for a jury trial is made by statute; or in cases of such a complicated and intricate nature involving mixed questions of law and fact not suitable for solution by a jury such as laches or estoppel.

Smith County Educ. Ass’n., 676 S.W.2d at 336 (quoting *Moore v. Mitchell*, 329 S.W.2d 821, 823-824 (Tenn. 1959)). Following the reasoning in *Moore*, the Supreme Court found that because the right to a jury trial was not “expressly excepted” by the two acts, the parties were entitled to have

¹“Suits in Chancery” are words of art and refer to cases of an equitable nature. See Gibson’s *Suits in Chancery*, Higgins & Crownover, 4th Ed., for their historical origin. In cases of this nature, the Statute affords the right to a jury to try and determine all material facts in dispute. It is thus distinguishable from the common law right to a jury trial as guaranteed by the Constitution. See *Myint v. Allstate Insurance Co.*, 970 S.W.2d 920 (Tenn. 1998). While the General Assembly placed jurisdiction to try Tennessee Human Rights Act cases in either Chancery or Circuit Court, actions under the Act are equitable in nature, and the right to a jury, as explained, is applicable, and is not dependent upon where the action is filed.

a jury determine the material facts of the case, and the case dealt solely with statutory causes of action with only equitable remedies.

Following the decisions of *Moore* and *Smith County Educ. Ass'n.*, the most common examples of situations where the Court has found there was no right to a jury trial, involved summary review by a Judge or provided for administrative processes. For example, in *State v. Harley*, 790 S.W.2d 276 (Tenn. 1990), the Court held there was no right to a jury in a proceeding conducted pursuant to T.C.A. § 44-17-120, which explicitly provides for a summary procedure for the destruction of vicious or rabid dogs. Likewise, a defendant was held not entitled to a jury trial in a contempt proceeding for violating an injunction against illegal sale of intoxicating liquor because the law explicitly provides that an abatement of public nuisance case should be conducted summarily by the Chancellor. *Pass v. State*, 184 S.W.2d 1 (Tenn. 1944).

A jury is not available in forfeiture proceedings where the legislature mandated proceedings in conformance with the Administrative Procedures Act which expressly provides for a trial by a judge without a jury. *Helms v. Tennessee Department of Safety*, 987 S.W.2d 545 (Tenn. 1999); *Jones v. Greene*, 946 S.W.2d 817 (Tenn. Ct. App. 1996). The Court in *Jones* made the following observations about forfeiture proceedings:

Every state has enacted statutes permitting the confiscation and forfeiture of property used in or derived from the sale of illegal drugs. Most of these statutes follow a judicial model that requires the seizing agency to commence forfeiture proceedings in court. Tennessee is one of five states that follow an administrative model in which forfeiture cases are processed by an administrative agency with the right of judicial review of the agency's decision. *The choice between the judicial or administrative model influences the claimant's right to a jury trial.*

946 S.W.2d at 824 (emphasis added).

Both *Jones* and *Helms* emphasized that the legislature is free to create new claims and remedies that do not include a trial by jury, which is what the legislature did in the instance of drug forfeiture cases in creating an administrative procedure and remedy that specifically excluded the right to a jury trial.

Likewise, in *Clark*, this Court found that the Domestic Abuse Act is expressly excepted from Tennessee's statutory right to a jury trial in equity matters. 37 S.W.3d 919 (Tenn. Ct. App. 2000). Because the Domestic Abuse Act does not, on its face, provide for or exclude a jury trial, the Court looked to legislative intent in its interpretation of that law. The statute provided that the "court" would issue a protective order, and that a "hearing" should be provided within 15 days. The Court interpreted these words to connote action of the Court without a jury. 37 S.W.3d at 923. The Court also found support for its interpretation in the purpose and intent of the statute, which was to provide a victim of domestic abuse with an expedited process and to protect that person from further harm. *Id.* at 924. Significantly, the specific language used by the Court in *Clark* evinces a

recognition of the fact that in order to remove a cause of action from the right to a jury trial, the cause must be “expressly excepted” by its language and intent. *Id.* at 922.

This Court has addressed the specific issue of whether a plaintiff bringing a claim under the Tennessee Human Rights Act has the right to a jury trial. In an unreported case out of the Middle Section, we held there was a right to a jury trial for a plaintiff bringing an action for retaliatory discharge under the THRA. *Sledge v. Phillips*, 1990 WL 62852 (Tenn. Ct. App. May 16, 1990). On appeal, the plaintiff argued that the Chancellor erred in treating the jury as advisory only, thus depriving her of her right to a trial by jury. This Court agreed:

In our opinion the plaintiff had a right to a trial by jury on all factual issues unless the right had been effectively waived. See Tenn. Code Ann. § 21-1-103 (1980); *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 337 (Tenn. 1984). Even if the cause of action were classified as purely equitable, the result would be the same and the findings of the jury would be entitled to the same weight as a common law verdict. *Id.*

1990 WL 62852 at *3.

Accord: Hannah v. Pitney Bowes, Inc., 739 F.Supp. 1131 (E.D. Tenn. 1989).

The THRA neither expressly provides for or excludes the right to a trial by jury in employment discrimination cases. Rather, it provides a claimant with a choice between an administrative procedure with judicial review or a direct civil cause of action in chancery or circuit court. Specifically, T.C.A. § 4-21-311 provides:

(a) Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in chancery court or circuit court.

(b) In such an action, the court may issue any permanent or temporary injunction, temporary restraining order, or any other order and may award to the plaintiff actual damages sustained by such plaintiff, together with the costs of the lawsuit, including a reasonable fee for the plaintiff’s attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

This language goes beyond that language of the statutes at issue in *Smith County Educ. Ass’n*, in that it specifically confers a civil cause of action upon any aggrieved person instead of merely speaking in terms of what the Court is given the authority to do. There is no indication in the Act that the legislature intended to exclude the right to a jury trial. Following the rationale in *Smith County Educ. Ass’n* and *Moore*, because there is no express exception to a party’s right to a jury, such parties have the statutory right to a jury in cases of discrimination under the Tennessee Human Rights Act.

The University takes a strong exception to Chancellor Brown’s decision, which we

affirm. First, the University reads *Moore v. Mitchell* to say that T.C.A. § 21-1-103 does not apply to statutorily created remedies unless the statute expressly provides for the right to a jury trial. However, this reading of *Moore* is incongruous with *Smith County Educ. Ass'n* and is an inaccurate interpretation of *Moore* itself. In *Moore*, the Court held that only cases that were excluded from the grant of the right to a jury trial were those in which the statute expressly excepted the right or those that by their very nature were inappropriate for a jury. *Moore*, 329 S.W.2d 821, 823-824 (Tenn. 1959). The Court then held that in these situations in which a jury would be improper, there may be a jury if there is an express provision for a jury trial in that statute. *Id.*

The Supreme Court made it clear in *Smith County Education Association* that a party has the right to a jury trial where the statute neither provides for, nor excludes the right to a jury trial. *Id.* 336-337. The Court did not require the statutes in question to have an express grant of the right to a jury in order for the parties to have that right. Moreover, *Clark* recognized that to exclude a case from T.C.A. § 21-1-103, there must be an express exception to the right to the jury in the statute. *Id.* at 922.

The University also relies on *Plasti-Line, Inc. v Tennessee Human Rights Commission*, 746 S.W.2d 691 (Tenn. 1988), arguing that the question before the court in that case was whether there was a right to demand a jury when seeking a statutory remedy under the THRA, to which the court answered in the negative. This too is an inaccurate reading of the case. The issue before the Court in *Plasti-Line*, was the constitutionality of the provision of the Human Rights Act regarding the formation and powers of the Human Rights Commission. Specifically, an employer was challenging a decision rendered by the Commission on the grounds that the power granted to the Commission violated separation of powers and the constitutional right to a jury.

The language in *Plasti-Line* that is so heavily relied upon by the University, states that “the fact that a trial by jury is not available under the statutes in question does not render them unconstitutional.” The statutes in question were those portions of the Act relating to the creation of the Human Rights Commission and the administrative remedies afforded to an aggrieved person. If an individual elects for administrative relief and then seeks judicial review of the Commissioner’s decision, it is clear under the Uniform Administrative Procedures Act that they are not afforded the right to a jury. However, in *Plasti-Line*, the provisions relating to the direct civil action were not at all addressed. Accordingly, not only is the language in *Plasti-Line* dicta, it does not apply to the issue before us.

The University’s final argument involves a provision of the Human Rights Act regarding discriminatory housing practices that specifically states that the parties have a right to a jury.

While a plaintiff bringing a claim under most sections of the THRA has the choice between the administrative procedure or filing directly in state court, in cases involving discriminatory housing practices, there is a third procedural option. If an aggrieved individual opts for administrative relief and the Commission has determined that there is reasonable cause to believe

that the respondent has engaged in a discriminatory housing practice, and if the complaint has not been resolved through a conciliation agreement, either of the parties may elect to have the claims and issues of the complaint decided in a civil action commenced and maintained by the commission. T.C.A. § 4-21-312. In a civil action brought in this specific manner, the parties are explicitly given the right to a jury trial. T.C.A. § 4-21-312(d).

The University contends that because the statute explicitly provides for a jury trial in one type of case, the legislature must have meant to exclude the right to a jury trial in all other cases. However, the University implies in its reasoning that the statute specifically grants a jury trial in housing discrimination cases that are brought directly in state court. That is not the case. The specific reference to a jury trial is directed at the particular administrative procedure outlined in § 4-21-312 that is unique to housing discrimination cases. Normally, if a party opts for the administrative remedy, there is no right to a jury trial before the Commission or upon judicial review. Clearly the legislature felt it necessary to specify that a jury would be available under § 4-21-312 when the case was brought to state court by the Commission in a quasi-administrative procedure.

It is a general rule of statutory construction that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned. *Carver v. Citizens Utilities Co.*, 954 S.W.2d 34, 35 (Tenn. 1997) Omissions are significant when statutes are expressed in certain categories but not others. *Id.* In *Carver*, the issue was whether punitive damages are available under § 4-21-306(8) as “other remedies.” The Court held that they were not, focusing in part on the fact that the statute expressly authorized punitive damages in § 4-21-311(c) only in cases involving discriminatory housing practices. The reasoning in *Carver* is not controlling because in the case before us, there is an underlying rule that allows for a jury trial unless the case is elsewhere excepted by law. Conversely, there is no underlying statutory or constitutional right to punitive damages. Moreover, the provision in the THRA that specifically addresses the jury issue relates to a very specific, quasi-administrative procedure that is unique to certain housing discrimination cases. Clearly the legislature felt the need to expressly provide for a jury trial in this instance to distinguish it from the judicial review of the Commission’s decision that are not afforded a jury trial. Stated another way, the question is not whether a jury trial is provided for by the THRA, but rather, whether the THRA is expressly exempted from T.C.A. § 21-1-103. Taking into account the text of the statutes and the interpretations given to that text in the foregoing decisions, we hold the THRA is not exempt from the statutory grant of the right to a jury trial by the parties.

We affirm the ruling of the Chancery Court in Hamilton County, and reverse the rulings by the Chancery Court in Knox County, and remand with the cost of the appeals assessed to the University of Tennessee.

HERSCHEL PICKENS FRANKS, J.